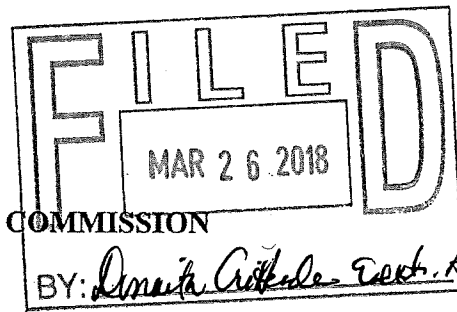


BEFORE THE
KENTUCKY LEGISLATIVE ETHICS COMMISSION
CASE NO. 17-LEC-01



REP. JIM WAYNE

COMPLAINANT

v.

PREHEARING STATEMENT

REP. JEFF HOOVER;
REP. JIM DeCESARE;
REP. BRIAN LINDER; AND
REP. MICHAEL MEREDITH

RESPONDENTS

* * * *

The Respondent, Representative Brian Linder ("Representative Linder"), tenders this Prehearing Statement to the members of the Legislative Ethics Commission ("Commission").

I. INTRODUCTION.

This matter was initiated with the filing of charges by Representative Jim Wayne ("Representative Wayne"). Representative Linder moved to dismiss the matter for lack of jurisdiction when the Commission convened on January 16, 2018. The governing regulation, 2 KAR 2:060, requires that the Commission as a whole rule on substantive or dispositive motions, such as that advanced by Representative Linder. The Commission did not rule on Representative Linder's Motion to Dismiss and it is therefore renewed.

The basis for the motion was, in part, that there is no proper complaint before the Commission as that term is defined by the governing statute and the Commission's own regulations. Absent a proper complaint, the Commission has no legal authority to proceed with the hearing. Further, to the extent that the conduct complained of in Representative Wayne's filing is discernible at all, it does not, and could not, violate the statute upon which he relies.

Representative Wayne filed the complaint based upon "information and belief" that Representative Linder and others may have violated the Legislative Ethics Code by engaging in inappropriate communications with a member of the legislative staff and then entering into a confidential settlement with her, funded from unknown sources. Representative Linder believes that this matter relates to a single text message interaction.

II. THE COMMISSION LACKS JURISDICTION TO CONDUCT A HEARING BECAUSE NO PROPER COMPLAINT HAS BEEN FILED.

Representative Wayne's "complaint" pled upon "information and belief," is based on nothing more than media reports. The complaint essentially alleges that if certain facts are true, a violation may have occurred. It is nothing more than speculation - a transparent invitation to the Commission to launch into an inquiry without any affirmative assertion of a violation of the Legislative Ethics Code. The complaint neither alleges that Representative Wayne has any personal knowledge of the subject matter, nor that he has discussed the facts with anyone who claims such knowledge. There is no sworn, affirmative attestation by him of the truth of any facts that would actually constitute an offense. To the extent that the "complaint" asserts facts at all, those assertions relate to Representative Hoover, not Representative Linder. The filing is little more than a compilation of unverified media stories and a request that the Commission look into the matter.

This is insufficient to invoke the Commission's jurisdiction, both according to the statute governing its proceedings and the Commission's own regulations. KRS 6.686(1)(a) provides that the complaint must be sworn and must allege facts that constitute a violation of the Legislative Ethics Code. The statute provides that the Commission has no jurisdiction in the absence of a complaint meeting these requirements. Here, there is no a proper complaint before the Commission and the Commission therefore lacks legal authority to proceed with a hearing.

The Commission's regulation, 2 KAR 2:060(2) defines complaint to mean, "a formal, written complaint filed in accordance with KRS 6.686 that accuses one or more persons of violating a provision of KRS 6.601 - 6.849." Representative Wayne's filing is not such a sworn accusation. It simply speculates that if selective and unverified media reports are true, there may be a violation. The requirement that the complaint must be signed under oath is significant. It is clearly intended to invoke the Commission's jurisdiction for matters involving a complainant who is willing to swear to facts that would constitute a violation. Most complaints initiating civil litigation and invoking a Circuit Court's jurisdiction are not sworn. The statute establishing the necessary prerequisites for the Commission's jurisdiction sets a higher bar. The clear intent of the requirement that complaints be sworn is to weed out matters such as this on in which the complainant is unwilling or unable to allege under oath a clear set of facts that would violate the Legislative Ethics Code.

Accordingly, the Commission is without jurisdiction to proceed. The filing is an attempt to beguile the Commission into exercising authority that it does not have-it cannot properly conduct a hearing without a complaint meeting the statutory requirements.

III. THE FILING DOES NOT ALLEGE FACTS WHICH, EVEN IF TRUE, VIOLATE THE STATUTES ON WHICH IT RELIES.

The filing alleges that three sections of the Legislative Ethics Code are implicated. These will be considered in turn.

KRS 6.731(2).

KRS 6.731(2) prohibits a legislator from using his official position to obtain financial gain. Representative Wayne's filing, on its face, makes no effort to allege a violation of KRS 6.731(2) and states only "if the Republican Party of Kentucky, the taxpayers of Kentucky, or another individual or entity paid the Respondents' settlement because of their legislative

positions, it would be a violation of KRS 6.731(2) and a Class D felony.” (Complaint, p. 6)(emphasis added). The complaint never alleges, however, that the funds used for the settlement came from an improper source. Indeed, there is not a shred of evidence that has ever been placed before the Commission to suggest an improper source for the funds to pay the settlement. This demonstrates the wisdom of requiring a proper complaint containing actual, sworn factual allegations of misconduct in order to invoke the Commission’s jurisdiction. Here, this matter has somehow reached a final adjudicatory phase based on an allegation that, on its face, never even accuses Representative Linder or his colleagues of a violation of KRS 6.731(2).

KRS 6.731(4).

Pursuant to KRS 6.731(4), a legislator is prohibited from using public funds, time, or personnel for private gain. This allegation demonstrates why the Commission should not proceed. Representative Wayne apparently alleges that Representative Hoover, “upon information and belief,” may have exchanged text messages with some third-party during “public events”. According to Representative Wayne, this is a waste of taxpayer’s dollars and a violation of the Legislative Ethics Code. Representative Wayne suggests that any legislator who exchanges a text message with a third-party that is unrelated to state business during a “public event” has committed both a violation of the Legislative Ethics Code and a crime. If so, one suspects that the Commission will have difficulty finding a legislator not in violation of this “rule”.

Representative Wayne then includes Representatives DeCesare, Linder and Meredith in this ill-conceived charge without actually alleging anything against any of them in this section of the filing. He concludes this section of the filing by stating, “This Commission should use its subpoena power granted to it in KRS 6.666 to investigate these Representatives’ actions and

roles in the Confidential Settlement Agreement.” This final statement by Representative Wayne demonstrates both his goal in filing the “complaint”, and the fatal flaw in proceeding with this matter. The face of the filing demonstrates that Representative Wayne has no idea what the facts are and has not sworn to allegations which would amount to a violation of the Legislative Ethics Code. He simply believes that the Commission should investigate because this matter has been the subject of media attention. Absent a valid complaint, however, the Commission simply has no jurisdiction to proceed. Accordingly, this matter should be dismissed.

KRS 6.731(3).

KRS 6.731(3) prohibits a legislator from using or attempting to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in direct contravention of the public interest at large. Violation of this subsection is a Class A misdemeanor. This section of Representative Wayne’s filing and is based on media reports concerning Representative Hoover’s interaction with a female legislative staff member. He then includes Representatives Linder, DeCesare and Meredith in this section of his filing by simply alleging that they entered into a settlement agreement “for reasons similar to Representative Hoover (i.e., *sexual harassment* of a female subordinate)”(emphasis added).

The fatal flaws in this section of Representative Wayne’s filing are obvious and many. He makes no factual allegations against Representative Linder that under the most generous standard invoke the Commission’s jurisdiction. The most he says is that Representative Linder may have entered into a settlement. Entering into a settlement does not constitute any evidence of misconduct. The assertion to the contrary is utterly unfounded in the law.

Representative Wayne’s filing is apparently about sexual harassment. In fact, he states that the “confidential settlement” was based on allegations of sexual harassment. Sexual

harassment is, undoubtedly, a serious issue and allegations of sexual harassment should be dealt with in a serious manner when properly raised before a tribunal having jurisdiction over those claims.

There is a well-developed body of statutory and common law designed to deal with sexual harassment claims. Victims of sexual harassment have legal remedies available upon appropriate proof. The plain fact is, however, that sexual harassment is not a violation of the Kentucky Legislative Ethics Code. The Kentucky General Assembly certainly could, and perhaps should, make sexual harassment a violation of the Legislative Ethics Code. In its wisdom, however, it has chosen not to do so. Representative Wayne's complaint is a thinly veiled effort to entice the Commission to act beyond its statutory authority in order to remedy this perceived omission on the part of the General Assembly. The Commission, through no fault of its own, lacks the legal authority to do so. The very fact that the General Assembly is now considering legislation (House Bill 9) that would essentially make sexual harassment a violation of the Legislative Ethics Code demonstrates that the Commission lacks statutory authority to proceed on what, at most, is a claim about sexual harassment.

IV. THE STATUTE, AS SOUGHT TO BE APPLIED IN THIS MATTER, IS UNCONSTITUTIONALLY VAGUE.

The crux of Representative Wayne's complaint concerning KRS 6.731(3) is sexual harassment. As currently constituted, sexual harassment is not a violation of the Legislative Ethics Code. Nevertheless, Representative Wayne attempts to shoehorn conduct which he does not describe into a statute that does not fit. Although his complaint gives Representative Linder no fair notice of what he is accused, we have been told it comes down to a single, allegedly inappropriate text exchange. If the General Assembly had incorporated sexual harassment into the Legislative Ethics Code, we could litigate this matter with a full understanding of the rules

and definitions governing sexual harassment and the sort of conduct that violates those rules. Representative Linder and his colleagues would have been on fair notice of conduct which is prohibited by the Legislative Ethics Code. The General Assembly has chosen, however, to omit sexual harassment as a violation of the Legislative Ethics Code. Given that legislative choice, it exceeds the Commission's authority to attempt to shoehorn a sexual harassment case into a statute that is clearly not designed for that purpose.

Such an effort is fatally flawed because it renders the statute, as sought to be applied, void for vagueness. The Kentucky Supreme Court has held that in order to satisfy a vagueness challenge, the statute must: "(1) provide fair notice to those targeted by the statute, by containing sufficient definiteness so that ordinary people can understand what conduct is prohibited, and (2) it must have been drafted in such a way to discourage arbitrary and discriminatory enforcement." *Tobar v. Commonwealth*, 284 S.W.3d 133, 135 (Ky. 2009). The statute, as applied, must give a person of ordinary intelligence the ability to know what conduct is prohibited. *Shickel v. Dilger*, 2017 WL 2464998 (ED. KY. 2017). The statute must be judged by whether the man on the street would understand what conduct is prohibited.

Here, the statute fails the test when it is applied to a claim of sexual harassment. Again, sexual harassment is a well-understood, well-defined legal concept. Statutes outlawing sexual harassment give a person of ordinary intelligence notice of the conduct that is prohibited and gives those adjudicating cases based on allegations of sexual harassment a defined set of rules that can be consistently and fairly applied. Representative Linder is confident that his conduct does not constitute sexual harassment. Representative Linder is not, however, accused of sexual harassment in this proceeding because sexual harassment is simply not part of the Legislative Ethics Code. Instead, he is accused of using his official position to somehow create some special

privilege for himself that is in direct contravention of the public interest at large. A “man on the street” could not read KRS 6.731(3) and have any indication that it could possibly be addressed to allegations of sexual harassment. Consequently, the statute fails the vagueness test and cannot be applied in this case.

Representative Linder understands that this matter has received great attention in the media. Should the Commission proceed with an adjudicatory hearing, it will be a matter of great interest to the media. The public interest is not served, however, by ignoring the legal limits on the Commission’s jurisdiction or principles of fundamental fairness in order to proceed with the hearing. If the General Assembly had wanted sexual harassment to be a violation of its ethics code, it would have said so in its statutes. Its failure to so say is not a failure of this Commission. The Commission’s authority is bounded, however, by the statutes enacted by the General Assembly. Exceeding those boundaries, even in a matter that has received considerable attention, violates time-honored principles of fundamental fairness.

V. THE COMPLAINT MUST BE DISMISSED BECAUSE IT WAS FILED AFTER THE APPLICABLE STATUTE OF LIMITATIONS EXPIRED.

The allegations related to KRS 6.731(3) must be dismissed because those allegations are subject to a one-year statute of limitations. A violation of KRS 6.731(3) is a Class A misdemeanor. Class A misdemeanors are subject to a one-year statute of limitations. KRS 500.050. Representative Wayne’s filing was received by the Kentucky Legislative Ethics Commission on November 15, 2017. To the extent that the filing makes discernable factual allegations at all, the conduct occurred more than one year prior to its filing. Accordingly, the complaint is barred by the applicable statute of limitations and must be dismissed.

VI. PROPOSED STIPULATION.

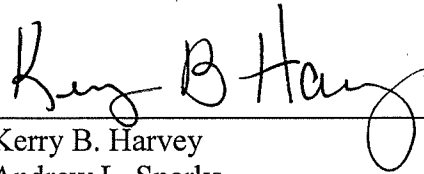
Representative Linder has proposed a stipulation of facts that would likely render testimony unnecessary. Enforcement Counsel is reviewing the proposal.

VII. WITNESS AND EXHIBIT LIST.

Representative Linder adopts the witness and exhibit list filed by the Co-Respondents in this matter.

VIII. CONCLUSION.

For the reasons stated herein, Representative Linder respectfully requests that the Commission dismiss this matter, with prejudice.



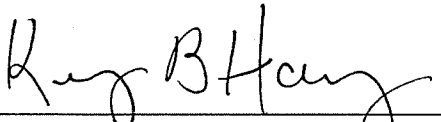
Kerry B. Harvey
Andrew L. Sparks
Dickinson Wright PLLC
300 West Vine Street, Suite 1700
Lexington, Kentucky 40507
Tel: (859) 899-8700
Fax: (844) 670-6009
Email: kharvey@dickinsonwright.com
asparks@dickinsonwright.com
COUNSEL FOR RESPONDENT,
REPRESENTATIVE BRIAN LINDER

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Prehearing Statement was mailed via U.S. Mail, postage prepaid, to the following on this the 26 day of March, 2018:

Patrick Michael Malone
Kentucky Legislative Ethics Commission
Enforcement Counsel
22 Mill Creek Park
Frankfort, KY 40601

Leslie P. Vose
Landrum & Shouse
106 West Vine Street, Suite 800
Lexington, KY 40507
lvose@landrumshouse.com



COUNSEL FOR RESPONDENT,
REPRESENTATIVE BRIAN LINDER